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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 253

HERMAN FREDERICK MARKS, PETITIONER

v.

P. A. ESPERDY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 73-79) is reported at 315 F. 2d 673. The opinion of the district court is reported at 203 F. Supp. 389.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1963. The petition for a writ of certiorari was filed on July 5, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's service in the Cuban Rebel Army after the Castro government became the official government of Cuba was voluntary service in the armed forces of a foreign state.

2. Whether Section 349(a)(3) of the Immigration and Nationality Act of 1952, providing for the expatriation of a native-born citizen who voluntarily serves in a foreign army without authorization, is constitutional.

3. Whether petitioner, who had been notified that he had lost United States citizenship by reason of unauthorized service in a foreign army, may be deported for entering the United States furtively without obtaining the documents required of entering alien immigrants.

4. Whether petitioner was denied a proper judicial determination of his alienage.

STATUTES INVOLVED

The Immigration and Nationality Act of 1952, 66 Stat. 163, provides in pertinent part:

> Section 349 [8 U.S.C. 1481]:
>
> (a) From and after the effective date of this Act a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—
>
> * * * *
>
> (3) entering, or serving in, the armed forces of a foreign state unless, prior to such entry or service, such entry or service is specifically au-

thorized in writing by the Secretary of State and the Secretary of Defense: *Provided*, That the entry into such service by a person prior to the attainment of his eighteenth birthday shall serve to expatriate such person only if there exists an option to secure a release from such service and such person fails to exercise such option at the attainment of his eighteenth birthday; or

Section 212 [8 U.S.C. 1182]:

(a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States;

* * * *

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act, and a valid unexpired passport, or other suitable travel document, or document of identity and nationality, if such document is required under the regulations issued by the Attorney General pursuant to section 211(e);

* * * *

STATEMENT

Petitioner was born in Milwaukee, Wisconsin, in 1921 (P.A. 50). In 1958, he joined Fidel Castro's revolutionary forces in Cuba and fought (as an officer) to overthrow the Batista government until late 1958, serving at times under the command of

Che Guevara. In November 1958, he came back to the United States (G.A. 80-86).

On January 1, 1959, the Castro government became the official government of Cuba (G.A. 299). During the first week of January 1959, petitioner returned to Cuba. Upon his arrival, he sought out the group with whom he had previously served and reported to Che Guevara (G.A. 88-89). The next day, Che Guevara assigned petitioner the post of security officer at La Cabana in Havana, identified by petitioner himself as a military and political prison. Petitioner held the rank of Captain. He was in charge of the execution of numerous persons condemned to death by revolutionary tribunals and in command of the guards at the prison (G.A. 56-57, 93, 96-102, 183-187, 133, 308-311). Petitioner and the men under him wore the uniforms of the Rebel Army (G.A. 95, 175-177, 189-192). In June 1959, petitioner was transferred and given various assignments of duty, principally as an officer in charge of guard duty (G.A. 58-61). In January 1960, he was made the security officer at the Principe Prison (G.A. 61-62). While petitioner was in Cuba, he was paid by the Rebel Army and was issued its identification card (G.A. 108-109, 208-213). He had freedom of movement in his off-duty hours (G.A. 121-122). Petitioner saw the American Consul in Havana frequently but never discussed his status with that official (G.A. 58, 62, 116). In February 1960, a certificate of loss of nationality was served upon petitioner by an official of the United States Embassy in Havana (G.A. 117-118). In July, 1960, petitioner entered the United

States at El Paso, Texas, without an immigration visa or document in lieu thereof (P.A. 18, 50).

In January 1961, petitioner was arrested and deportation proceedings were commenced against him. The government asserted that he had lost his citizenship by serving in the Cuban Army without authorization, and that he was a deportable alien because he had entered the United States without proper documents and because he had been convicted in 1952 of a crime involving moral turpitude (P.A. 17-21). At the hearing, the above facts with respect to petitioner's military service and entry without documentation were adduced. Petitioner claimed that he returned to Cuba in January 1959 for a reunion with friends and to obtain land that he expected in return for his participation in the revolution (G.A. 87-88, 134-135). He said that he accepted his assignment in the Rebel Army because of fear of Che Guevara (P.A. 151-153). The special inquiry officer found that petitioner was an alien at the time of his entry in 1960 and was deportable on the ground that he entered without documentation. He also held that he was excludable as one convicted of a crime involving moral turpitude. The Board of Immigration Appeals sustained the order of deportation (G.A. 366-378).

Petitioner then filed a habeas corpus petition in the United States District Court for the Southern District of New York (P.A. 5-17). It was stipulated that the transcript of the hearing before the special inquiry officer would be considered as the testimony in the case (P.A. 30-33). The district court ruled that petitioner had lost his citizenship but that he

could not be deported. 203 F. Supp. 389. Upon cross-appeals, the court of appeals held that petitioner was no longer a citizen and that he could be deported as an alien who entered without documentation. The court found it unnecessary to consider whether petitioner was also deportable because of his conviction for crime. 315 F. 2d 673.

ARGUMENT

1. Section 349(a)(3) of the Immigration and Nationality Act (*supra*, p. 2) provides that a United States national shall lose his nationality by serving in the armed forces of a foreign state without the authorization of the Secretary of State and the Secretary of Defense. There is no merit in petitioner's claim that his service in the Cuban army after Castro assumed power in 1959 was involuntary and did not constitute service in a foreign army. Unlike the petitioner in *Nishikawa* v. *Dulles*, 356 U.S. 129, petitioner was not conscripted into military service. He was in the United States when the new regime came into power. He choose to return to Cuba where he sought out his former unit and reported to his former superior officer, Che Guevara. He accepted a command position with the rebel army the day after his arrival in the country. He did not protest this assignment either to Che Guevara or to American consul whom he saw frequently. The failure to make even a mild objection to his service refutes the claim that he acted under compulsion of Che Guevara's orders. Petitioner, moreover, showed no reluctance in the performance of his duties. That this claim of duress in an afterthought is borne out by

petitioner's own account of his service, written prior to the institution of deportation proceedings, which makes no mention of duress (G.A. 208).

Contrary to petitioner's contention (Pet. 53-66), the Rebel Army was part of the armed forces of Cuba. Witnesses at the hearing before the special inquiry officer testified that it was the only army left in Cuba after January 1, 1959, and that the regular army which had existed under Batista was integrated into the Rebel Army (G.A. 51, 54, 265-270). While it is true that the Rebel Army was assigned functions of a non-military nature, a part of this army "was in the quarters with their arms" (G.A. 235). In October 1959, Cuban Law 600 explicitly declared that "members of the Rebel Army and other persons at present rendering real and effective service in any of the Armed Forces of the Nation, shall retain their military status" (P.A. 270-271).

2. Congress has the power to divest of American nationality citizens who perform unauthorized military service for a foreign state.

a. The power of Congress to enact this legislation follows, *a fortiori*, from *Perez* v. *Brownell*, 356 U.S. 44. In that case, this Court upheld the power of Congress, under its foreign relations power, to impose loss of nationality for voting in a foreign political election, finding it reasonable for Congress to conclude that such voting might jeopardize the successful conduct of foreign affairs.

It is not debatable that serious problems in the conduct of foreign relations may be created by military service in a foreign army. Such service, for ex-

ample, may be viewed as tacit military aid to the foreign state and lead to grave international complications. It may also cause a dispute between two nations over the military service of an individual. In all circumstances where the statute is operative, there is involvement with a foreign state. It was reasonable for Congress to regulate this problem by withdrawing citizenship from those who take it upon themselves to affect foreign relations by joining foreign armies without governmental permission.

b. Apart from the question of embarassment to the conduct of foreign affairs, we submit that Congress has plenary power over the citizenship of those who have transferred their allegiance. Entry into a foreign army is an outward manifestation of allegiance to the foreign state n significantly different from taking an oath of allegiance to a foreign power. By joining the Cuban army, petitioner placed himself under the dominion of the Cuban government through its control of his superior officers, whose orders he was duty bound to follow. He thus implicitly swore allegiance to Cuba. This course of action, unauthorized by the American government, may reasonably be considered incompatible with continued allegiance to this country, constituting an abandonment of citizenship.

c. Unlike *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, and *Trop* v. *Dulles*, 356 U.S. 86 where the aim of the statute was found to be additional punishment (for draft evasion and for desertion, respectively) the history of section 349(a)(3) indicates no purpose to impose punishment. Its essential history is

set forth in *Perez* v. *Brownell*, 356 U.S. 44. In brief, prior to the Nationality Act of 1940, nationality could be lost by service in a foreign army if an oath of allegiance was required. In its preliminary draft of the 1940 Act, the Cabinet Committee recommended that nationality be lost by service in the armed forces of a foreign state when not expressly authorized by United States laws. The Committee considered that such foreign military service was a transfer of allegiance to the foreign state.[1] The 1940 Act, as passed, 54 Stat. 1137, provided for loss of nationality for foreign military service when the person had or acquired the foreign nationality. The present Act eliminated this condition, adopting the recommendation of the earlier Cabinet Committee. Its object was to make loss of nationality equally applicable to all persons who serve in foreign armies, treating native born and naturalized citizens alike and eliminating dependency upon foreign law. See S. Rep. No. 1515, 81st Cong., 2nd Sess., p. 749. This history indicates both a Congressional purpose to act under its foreign affairs power and a recognition that service in a foreign army is a transfer of allegiance to the foreign power.[2]

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[1] The Committee reported (H.R. Comm. Print., Pt. 1, 76th Cong., 1st Sess. pp. 66-67): "This provision is based upon the theory that an American national who, after reaching the age of majority * * * voluntarily enters, or continues to serve in, the army of a foreign state, thus offering his all in support of such state, should be deemed to have transferred his allegiance to it. * * *"

[2] Petitioner quotes from a cabinet committee report (Pet. 15-16). The full paragraph from which he quotes a portion

d. Nor does the fact that petitioner has become stateless render the statute unconstitutional in its application to him or compel a construction which would require a verbal renunciation of American citizenship. In amending the statute, Congress eliminated the condition that loss of American nationality would be noted only if a foreign nationality remains or is acquired. The statute gave full notice that voluntary service in a foreign army would resul in a loss of America citizenship. Petitioner thus lost United States nationality when he voluntarily served in the Cuban army without authorization of the American government. By this act he also expressed allegiance to Cuba, whether or not under Cuban law he acquired, or could have acquired, Cuban citizenship. Petitioner's present situation is the outcome of his difficulties with the nation in whose army he chose to serve; that he now regrets his choice does not serve to make the statute invalid.

3. Petitioner does not dispute the proposition that he entered the United States at El Paso in July 1960, without the documents required of entering aliens by

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is as follows:

"None of the various provisions of the Code concerning loss of American nationality, such as those applicable to children born abroad to parents only one of whom has American nationality and persons who, after obtaining American nationality through naturalization, establish a residence abroad, is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States." H.R. Comm. Print, Pt. 1, 76th Cong., 1st Sess. p. VII.

section 212(a) of the Immigration and Nationality Act of 1952. He contends, however, that until there was a judicial determination that he was expatriated, he had a right to ignore the certificate of loss of nationality and to enter the United States as a citizen (Pet. 66-69).

Section 212 of the 1952 Act (*supra*, p. 3) provides that an alien shall be excluded from entry into the United States unless he possesses certain documents. The language covers a former citizen who has lost his nationality. The issue, then, is the time when citizenship is lost. The answer is that Congress, in section 356 of the 1952 Act, declared that nationality is lost "solely from the performance by a national of the acts or fulfillment of the conditions" which it has specified. In petitioner's case, he lost his citizenship when he took up service in the Cuban Army and thereby transferred his allegiance to Cuba.

This did not deprive petitioner of judicial remedy. Petitioner could have applied for a certificate of identity and requested admission to the United States under such certificate. If he was refused entry, he could have filed a petition for habeas corpus and obtained a determination of his citizenship. Alternatively, petitioner could have filed an action abroad for a declaratory judgment that he is a citizen. *Rusk* v. *Cort*, 369 U.S. 367. Petitioner, knowing that he was deemed an alien, did not present himself and claim citizenship. He entered surreptiously. He is in no position to complain that, on a judicial determination that he is an alien, he is placed in the same position as any other alien who enters in like manner.

4. Petitioner also complains of his administrative arrest and subsequent detention prior to the judicial determination that he had lost his citizenship. But petitioner was not denied a right to a judicial determination prior to administrative action. He could have instituted an action for a declaration of citizenship in the six months period from the time he entered the United States in July 1960 until his arrest in January 1961. Since he failed to use this opportunity, there is no reason why he should not be subject to administrative action.

CONCLUSION

For the forgoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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